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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA-EASTERN DIVISION

12 KEYSHA L. AINSWORTH,) Case No. EDCV 18-01116-AS
13)
14 Plaintiff,) MEMORANDUM OPINION AND
15 v.) ORDER OF REMAND
16)
17 NANCY A. BERRYHILL, Acting)
18 Commissioner of Social)
Security,)
Defendant.)
_____)

19 PROCEEDINGS
20

21
22 On May 5, 2018, Plaintiff filed a Complaint seeking review of the
23 denial of her applications for Disability Insurance Benefits and
24 Supplemental Security Income. (Docket Entry No. 1). The parties have
25 consented to proceed before the undersigned United States Magistrate
26 Judge. (Docket Entry Nos. 11-12). On October 11, 2018, Defendant filed
27 an Answer along with the Administrative Record ("AR"). (Docket Entry
28 Nos. 15-16). On February 14, 2019, the parties filed a Joint

1 Stipulation ("Joint Stip.") setting forth their respective positions
2 regarding Plaintiff's claims. (Docket Entry No. 25).

3
4 The Court has taken this matter under submission without oral
5 argument. See C.D. Cal. L.R. 7-15.

6
7 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**
8

9 On October 24, 2014, Plaintiff, formerly employed as an insurance
10 agent, a real estate loan coordinator, and a loan collection officer
11 (see AR 37-45, 65-68, 263), filed an application for Disability
12 Insurance Benefits, alleging an inability to work because of a disabling
13 condition since January 31, 2014. (See AR 219-22). On the same date,
14 Plaintiff filed an application for Supplemental Security Income,
15 alleging a disability since July 18, 2014. (See AR 223-29).

16
17 On February 6, 2017, the Administrative Law Judge ("ALJ"), John
18 Moreen, heard testimony from Plaintiff (represented by counsel) and
19 vocational expert Davis Martin Brodwin. (See AR 35-73). On April 28,
20 2017, the ALJ issued a decision denying Plaintiff's applications. (See
21 AR 13-27). After determining that Plaintiff had severe impairments --
22 depressive disorder and post-traumatic stress disorder (AR 15-16)¹ -- but
23 did not have an impairment or combination of impairments that met or
24 equaled the severity of one of the listed impairments (AR 16-18), the
25 ALJ found that Plaintiff had the residual functional capacity ("RFC")²

26
27 ¹ The ALJ found that Plaintiff's other impairments -- back and
sciatic leg pain, and obesity -- were nonsevere. (AR 16).

28 ² A Residual Functional Capacity is what a claimant can still do
despite existing exertional and nonexertional limitations. See 20
(continued...)

1 to perform a full range of work at all exertional levels with the
2 following non-exertional limitations: can perform moderately complex
3 tasks of four to five steps; no interpersonal interactions and no team
4 work; and no highly stressful jobs with high production quotas. (AR 18-
5 25). The ALJ then determined that Plaintiff was not able to perform any
6 past relevant work (AR 25), but that Plaintiff could perform jobs
7 existing in significant numbers in the national economy and was
8 therefore not disabled within the meaning of the Social Security Act.
9 (AR 26-27).

10
11 Plaintiff requested that the Appeals Council review the ALJ's
12 decision. (See AR 217, 351-53). The request was denied on March 29,
13 2018. (See AR 1-5). Plaintiff now seeks judicial review of the ALJ's
14 decision, which stands as the final decision of the Commissioner. See
15 42 U.S.C. §§ 405(g), 1383(c).

16 17 STANDARD OF REVIEW

18
19 This Court reviews the Commissioner's decision to determine if it
20 is free of legal error and supported by substantial evidence. See
21 Brewes v. Comm'r, 682 F.3d 1157, 1161 (9th Cir. 2012). "Substantial
22 evidence" is more than a mere scintilla, but less than a preponderance.
23 Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014). To determine
24 whether substantial evidence supports a finding, "a court must consider
25 the record as a whole, weighing both evidence that supports and evidence
26

27
28 ² (...continued)
C.F.R. §§ 404.1545(a)(1), 416.945(a)(1).

1 that detracts from the [Commissioner's] conclusion." Aukland v.
2 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001)(internal quotation
3 omitted). As a result, "[i]f the evidence can support either affirming
4 or reversing the ALJ's conclusion, [a court] may not substitute [its]
5 judgment for that of the ALJ." Robbins v. Soc. Sec. Admin., 466 F.3d
6 880, 882 (9th Cir. 2006).³

7 8 **PLAINTIFF'S CONTENTIONS**

9
10 Plaintiff alleges that the ALJ erred in failing to (1) provide
11 proper reasons for finding Plaintiff's testimony not credible; (2)
12 properly reject the opinions of Plaintiff's treating psychiatrist and
13 other treating physicians; and (3) properly reject Plaintiff's mother's
14 testimony. (See Joint Stip. at 4-11, 16-24, 29-33).

15 16 **DISCUSSION**

17
18 After consideration of the record as a whole, the Court finds that
19 Plaintiff's first claim of error warrants a remand for further
20 consideration. Since the Court is remanding the matter based on
21 Plaintiff's first claim of error, the Court will not address Plaintiff's
22 second and third claims of error.

23
24
25
26 ³ The harmless error rule applies to the review of
27 administrative decisions regarding disability. See McLeod v. Astrue,
28 640 F.3d 881, 886-88 (9th Cir. 2011); Burch v. Barnhart, 400 F.3d 676,
679 (9th Cir. 2005)(An ALJ's decision will not be reversed for errors
that are harmless).

1 **A. The ALJ Did Not Properly Assess Plaintiff's Testimony**
2

3 Plaintiff asserts that the ALJ did not provide proper reasons for
4 finding that Plaintiff's testimony about her symptoms and limitations
5 was not fully credible. (See Joint Stip. at 4-11, 16-18). Defendant
6 asserts that the ALJ provided sufficient reasons for finding Plaintiff
7 not fully credible. (See Joint Stip. at 11-16).
8

9 1. Legal Standard
10

11 Where, as here, the ALJ finds that a claimant suffers from a
12 medically determinable physical or mental impairment that could
13 reasonably be expected to produce her alleged symptoms, the ALJ must
14 evaluate "the intensity and persistence of those symptoms to determine
15 the extent to which the symptoms limit an individual's ability to
16 perform work-related activities for an adult" Soc. Sec. Ruling
17 ("SSR") 16-3p, 2017 WL 5180304, *3.⁴
18

19 A claimant initially must produce objective medical evidence
20 establishing a medical impairment reasonably likely to be the cause of
21 the subjective symptoms. Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir.
22 1996); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991). Once a
23 claimant produces objective medical evidence of an underlying impairment
24 that could reasonably be expected to produce the pain or other symptoms
25

26 ⁴ SSR 16-3p, which superseded SSR 96-7p, is applicable to this
27 case, because SSR 16-3p, which became effective on March 28, 2016, was
28 in effect at the time of the Appeal Council's March 29, 2018 denial of
Plaintiff's request for review. 20 C.F.R. § 404.1529, the regulation on
evaluating a claimant's symptoms, including pain, has not changed.

1 alleged, and there is no evidence of malingering, the ALJ may reject the
2 claimant's testimony regarding the severity of his or her pain and
3 symptoms only by articulating specific, clear and convincing reasons for
4 doing so. Brown-Hunter v. Colvin, 798 F.3d 749, 755 (9th Cir.
5 2015)(citing Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir.
6 2007)); see also Smolen, *supra*; Robbins v. Social Sec. Admin, 466 F.3d
7 880, 883 (9th Cir. 2006); Reddick v. Chater, 157 F.3d 715, 722 (9th Cir.
8 1998); Light v. Social Sec. Admin., 119 F.3d 789, 792 (9th Cir. 1997).
9 Because the ALJ does not find that Plaintiff was malingering,⁵ the
10 "clear and convincing" standard stated above applies.
11

12 Generalized, conclusory findings do not suffice. See Moisa v.
13 Barnhart, 367 F.3d 882, 885 (9th Cir. 2004)(the ALJ's credibility
14 findings "must be sufficiently specific to allow a reviewing court to
15 conclude the [ALJ] rejected [the] claimant's testimony on permissible
16 grounds and did not arbitrarily discredit the claimant's testimony")
17 (citation and internal quotation marks omitted); Holohan v. Massanari,
18 246 F.3d 1195, 1208 (9th Cir. 2001)(the ALJ must "specifically identify
19 the testimony [the ALJ] finds not to be credible and must explain what
20 evidence undermines the testimony"); Smolen, 80 F.3d at 1284 ("The ALJ
21 must state specifically which symptom testimony is not credible and what
22 facts in the record lead to that conclusion.").

23
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26 ⁵ Although the ALJ, when addressing Plaintiff's testimony, noted
27 that the examining psychologist, Dr. Margaret Donohue, found that
28 Plaintiff was a malingerer (see AR 24 ["Finally, Dr. Donohue's
consutative examination report and her diagnosis of malingering is noted
(Exhibit B3F/6)"]; see also AR 23), the ALJ gave Dr. Donohue's opinion
little weight (see AR 23) and did not affirmatively find that Plaintiff
was a malingerer.

1 2. The ALJ's Credibility Findings

2
3 Plaintiff made the following statements in a Function Report -
4 Adult dated December 6, 2014 (see AR 279-87):

5
6 She lives in a house with family. Her mood changes,
7 lack of memory, difficulty concentrating, panic attacks,
8 anxiety, irritability, restlessness, nervousness, and
difficulty sleeping limit her ability to work. (See AR 279).

9 With respect to her daily activities, every day is
10 different. Some days she wants to stay in bed; other days
11 she gets up, dresses, and goes on a walk. She does not take
12 care of anybody else or pets. Prior to her conditions, she
13 took care of her daughter (who passed away). Her conditions
14 affect her sleep -- she sleeps all day, but her new
15 medication prevents her from sleeping (so she has to take
16 medication to sleep). She does not have any problem with
17 personal care (dressing, bathing, caring for hair, shaving,
18 feeding self, using the toilet), but some days she does not
19 feel like taking care of her personal needs. Her mother
20 sometimes asks her if she took her medication. She is able
21 to make sandwiches or warm up food in the microwave, but her
22 mother normally prepares her food or meals. She no longer
23 cooks because she does not have the desire or the
24 concentration/memory. She does not do any household chores,
25 except for making her bed when she decides to get up or
washing her plate or glass after eating (it takes her time to
do such chores, and her mother needs to encourage her to do
such chores). She goes outside when she feels like it,
driving or riding in a car. She shops in stores to buy
groceries (about once a month with her mother) and to buy
personal items. She is able to pay bills (her mother pays
her bills), count change, handle a savings account, and use
a checkbook/money orders. Since her conditions began, she
has not had her own money to handle. She does not have any
hobbies and interests, and she does not know if her hobbies
and interests have been affected by her conditions. Twice a
month she goes out with a friend for a meal or just to get
out. She does not go any places on a regular basis. She can
go out without anybody accompanying her. Since her
conditions began, she does not have any desire to do social
activities. (See AR 280-84).

26 Her conditions affect her abilities to remember,
27 complete tasks, concentrate, and understand and follow
28 instructions. She can pay attention for 5 to 10 minutes.
She does not finish what she starts. She does not follow
written instructions well because her mind drifts off. She
thinks she follows spoken instructions okay. She has never

1 been fired or laid off from a job because of problems getting
2 along with other people. She is not able to handle stress or
3 changes in routine. Her unusual behaviors are not
4 remembering things and feeling fearful. She takes the
5 following medications (which either affect her sleep or make
6 her sleepy): Bupropion, 150 mg; Doxepin, 50mg; Temazepam, 30
7 mg; Lorazepam; and Sertraline/Remeron. (See AR 284-86).

8
9 Plaintiff gave the following testimony at the administrative
10 hearing (see AR 36-53, 55-68):

11 She is 50 years old, and she lives with her mother in
12 her mother's house. She attended college, but did not obtain
13 a degree or a certificate. In 2011 her daughter died of
14 cancer -- her daughter's death was a shock; taking care of
15 her daughter caused her hair to fall out. She is not able to
16 work because she has: (1) panic attacks every other day (her
17 mind shuts down, she cannot breathe, she hears voices in her
18 head, she has to get away from crowds, she has bad thoughts
19 about sometimes hurting herself or acting violently) which
20 sometimes last about one and half hours and for which she
21 takes medication daily (an extra pill, which she carries on
22 her, helps her calm down but does not prevent such attacks);
23 (2) memory loss/forgetfulness daily (she forgets what she is
24 doing; her mother thinks it could be a side effect of her
25 medications); (3) confusion daily; (4) depression (she cries
26 once or twice a day -- medication sometimes but does not
27 always control her crying; the crying sometimes lasts until
28 she has a panic attack and starts to vomit and then goes to
sleep); and (5) insomnia (she sometimes is up all night, and
appears to see shadows of individuals to whom she talks; the
medications have not helped her and have side effects,
including leg cramps, numb legs, trembling, and incoherent
speech). Her crying outbreaks happen all the time, and are
triggered by any reminders about her daughter (television
commercials, seeing her niece, visits from family with
children). (See AR 36-37, 45-48, 55-63).

22 She last worked in 2011. From 2007 to 2011, she
23 received self-employment income for work as an insurance
24 agent. From 2006 to 2007, she worked for her family's
25 business as a loan originator/coordinator for real estate.
26 She left that job in 2007 because her daughter got sick.
27 From 2002 to 2005, she worked as a loan collection officer.
28 All three positions were desk jobs which did not involve
lifting and carrying. (See AR 37-45, 65-68).

When asked about the consultative examiner's finding
that she was a malingerer, she said that the day of the
evaluation (her friend took her there), she was not feeling
mentally well (which means "I shut(s) [sic] down and I don't

1 feel like doing nothing", and she was on a new medication),
2 and she told the examiner she was confused and was not
3 feeling well. She did not understand that the evaluation was
4 to determine whether or not she was disabled; she just
5 thought she was going for an evaluation. After she left the
6 evaluation, she had a panic attack and vomited. (See AR 49-
7 51, 60-61, 64).

8 She has someone treat and wash her hair (her hair has
9 not fully grown back since 2011). She no longer cooks; she
10 burned herself taking something out of the oven with her
11 hands. She makes her bed and vacuums. She used to do
12 laundry, but now her mother does the laundry (her mother does
13 not want her dealing with machines). She has a driver's
14 license, but her friend drove her to the hearing. She shops
15 for groceries and does activities with her mother; she does
16 not shop for groceries on her own -- the last time she went
17 shopping on her own, 3 to 4 months earlier, she walked out of
18 the store without paying for the item). (See AR 47, 51-53,
19 60, 63-64).

20 After summarizing Plaintiff's testimony (see AR 19)⁶, the ALJ
21 discussed the medical evidence in the record, including the opinions of
22 Plaintiff's treating physicians, the consultative examiner, and the
23

24 ⁶ The ALJ wrote:

25 The claimant alleges that she experiences depression;
26 mood changes, anxiety, panic attacks (in which her mind
27 shuts down, she can't breathe, and she has to isolate
28 herself); crying spells; irritability; restlessness;
insomnia; fearfulness; fatigue; problems focusing;
concentrating, and understanding; memory loss; confusion;
thoughts and voices in her head; "dreams" where she sees
shadows of individuals and talks to them; hair loss; and
feelings of emptiness, lifelessness, and being "blocked"
(Exhibits B4E/2; B5E/1, 2, 6, 7; B9E/1; Hearing). As a
result, she described difficulty following instructions,
completing tasks, handling stress, and handling changes
in routine (but does not claim any physical limitations)
(Exhibit B5E/6, 7). The claimant also indicates that her
medications cause poor focus, grogginess, sleepiness, an
inability to sleep, hallucinations, suicidal thoughts,
disturbing thoughts, anxiety, fatigue, a feeling of
having a heavy head and needing to lie down, memory loss,
slurred and slow speech, an inability to get words out,
a painful rash on her face and neck, "feeling bad," and
cramps and numbness in her legs (Exhibits B5E/8; B9E/1,
3; B11E/2, 5).

1 State agency psychiatric consultant. (See AR 19-24). The ALJ then
2 addressed Plaintiff's testimony as follows:
3

4 The claimant's allegations of generally disabling symptoms
5 and limitations (including claims of hallucinations and
6 suicidal thoughts caused by medication) are not corroborated
7 by the evidence in the record, as detailed above. In
8 addition, the record shows that the claimant has no problems
9 with personal care; does not need any help dressing, bathing,
10 preparing meals, doing household chores, or shopping;
11 prepares food; performs some household chores (including
12 making the bed, washing dishes, and vacuuming); drives a
13 car; is able to pay bills, count change, handle a savings
14 account, and use a checkbook or money orders; spends time with
15 friends daily (including talking, taking walks, and going out
16 to lunch or dinner); and has breakfast and watches television
17 with her mother (Exhibits B3F/3, 6; B5E/2, 3, 4, 5; B6E/2, 4,
18 5; B9E/4; B11E/6; Hearing). These activities are not
19 inconsistent with the above residual functional capacity
20 (which describes *the most* the claimant can do). They are,
21 however, inconsistent with allegations of disability because
22 they suggest that the claimant is capable of performing
23 appropriate work activities on an ongoing and daily basis.
24

25 Furthermore, as detailed above, there is considerable
26 evidence of non-compliance with treatment (including failing
27 to show up for appointments and not taking medication as
28

1 prescribed) (see, e.g., Exhibits B2F/16; B4F/2, 6, 21;
2 B7F/10, 14; B9F/13, 21, 47, 48)[.]
3

4 The claimant also indicated that she could not write more
5 than her own name in English, although she was able to
6 complete a function report by hand (Exhibits B4E/1; B5E).
7

8 Finally, Dr. Donohue's consultative examination report and
9 her diagnosis of malingering is noted (Exhibit B3F/6).
10

11 Accordingly, after careful consideration of the evidence, the
12 undersigned finds that the claimant's medically determinable
13 impairments could reasonably be expected to produce the above
14 alleged symptoms; however, her statements concerning the
15 intensity, persistence and limiting effects of these symptoms
16 are not entirely consistent with the medical evidence and
17 other evidence in the record for the reasons explained above.
18 Accordingly, these statements have been found to affect the
19 claimant's ability to work only to the extent they can
20 reasonably be accepted as consistent with the objective
21 medical and other evidence.
22

23 (AR 24-25).
24
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28

1 3. The ALJ's Assessment of Plaintiff's Testimony

2
3 As set forth below, the ALJ failed to provide legally sufficient
4 reasons for discrediting Plaintiff's testimony about the intensity,
5 persistence and limiting effects of her pain and symptoms.⁷

6
7 First, the ALJ failed to "specifically identify 'what testimony is
8 not credible and what evidence undermines [Plaintiff's] complaints.'" Parra v. Astrue, 481 F.3d 742, 750 (9th Cir. 2007)(quoting Lester v.
9 Chater, 81 F.3d 821, 834 (9th Cir. 1995)); see also Smolen, 80 F.3d at
10 1284 ("The ALJ must state specifically what symptom testimony is not
11 credible and what facts in the record lead to that conclusion").
12

13
14 Second, the ALJ's partial discounting of Plaintiff's testimony
15 about her symptoms and limitations based on her ability to perform
16 certain daily activities, such as personal care (including dressing and
17 bathing), preparing meals and food, doing household chores (including
18 making the bed, washing the dishes, and vacuuming), driving a car,
19 shopping, abilities to pay bills, count change, handle a savings
20 account, and use a checkbook or money orders, spending time with friends
21

22
23 ⁷ The Court will not consider reasons for discounting
24 Plaintiff's subjective symptom testimony that were not given by the ALJ
25 in the decision (see Joint Stip. at 13-15, i.e., inconsistencies between
26 Plaintiff's testimony and Plaintiff's medical records about
27 hallucinations and suicidal thoughts caused by medications, nature of
28 Plaintiff's responses at the administrative hearing, inconsistencies in
Plaintiff's prior application). See Connett v. Barnhart, 340 F.3d 871,
874 (9th Cir. 2003)("We are constrained to review the reasons the ALJ
asserts."; citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) and
Pinto v. Massanari, 249 F.3d 840, 847-48 (9th Cir. 2001)); Garrison v.
Colvin, 759 F.3d 995, 1010 (9th Cir. 2014)("We review only the reasons
provided by the ALJ in the disability determination and may not affirm
the ALJ on a ground upon which he did not rely.").

1 (including talking, taking walks, and going out to lunch or dinner), and
2 having breakfast and watching television with her mother was not a clear
3 and convincing reason. See Vertigan v. Halter, 260 F.3d 1044, 1050 (9th
4 Cir. 2001)("[T]he mere fact that a plaintiff has carried on certain
5 daily activities . . . does not in any way detract from her credibility
6 as to her overall disability. One does not need to be 'utterly
7 incapacitated' in order to be disabled."); Reddick, supra ("Only if the
8 level of activity were inconsistent with the Claimant's claimed
9 limitations would these activities have any bearing on Claimant's
10 credibility."). While a plaintiff's ability to spend a "substantial
11 part" of his or her day engaged in pursuits involving the performance
12 of physical functions that are transferable to a work setting may be
13 sufficient to discredit him or her, here, there is no evidence that
14 Plaintiff was spending a substantial part of her day engaged in these
15 activities or that the physical demands of such tasks as personal care
16 (including dressing and bathing), preparing meals and food, doing
17 household chores (including making the bed, washing the dishes, and
18 vacuuming), driving a car, shopping, abilities to pay bills, count
19 change, handle a savings account, and use a checkbook or money orders,
20 spending time with friends (including talking, taking walks, and going
21 out to lunch or dinner), and having breakfast and watching television
22 with her mother were transferable to a work setting. See Ghanim v.
23 Colvin, 763 F.3d 1154, 1165 (9th Cir. 2014)("However, there is no
24 indication here that the limited activities Ghanim engaged in, often
25 with the help of a friend, either comprised a 'substantial portion' of
26 Ghanim's day, or were 'transferrable' to a work environment."); Morgan
27 v. Comm'r of Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999).
28 Indeed, at the hearing, the ALJ did not ask Plaintiff about the amount

1 of time it took her to perform personal care activity (including
2 dressing and bathing), prepare meals and food, household chores
3 (including making the bed, washing the dishes, and vacuuming), drive,
4 shop, and spend time with friends (including talking, taking walks, and
5 going out to lunch or dinner) or how often she did these activities.
6 Thus, Plaintiff's admitted daily activities do not constitute a legally
7 sufficient reason to reject Plaintiff's subjective symptom testimony.
8

9 It is not clear whether the ALJ considered Plaintiff's testimony
10 about her limited abilities to perform such daily activities (see AR 280
11 [Plaintiff stated in the Function Report that on some days she gets
12 dressed], AR 281 [Plaintiff stated in the Function Report that on some
13 days she does not feel like taking care of her personal needs and
14 grooming], AR 281 [Plaintiff stated in the Function Report that she
15 "makes a sandwich" [and] warm[s] up food in the microwave," that her
16 mother normally prepares food or meals, that it takes her time to
17 prepare food or meals, and that she does not cook any more], AR 63-64
18 [Plaintiff testified at the hearing that she has somebody wash and treat
19 her hair], AR 47, 51-52 [Plaintiff testified at the hearing that she no
20 longer cooks], AR 281 [Plaintiff stated in the Function Report that she
21 is very slow at making her bed and washing her own dishes and that she
22 needs her mother's encouragement to do these chores], AR 52 [Plaintiff
23 testified at the hearing that her friend drove her to the hearing], AR
24 282 [Plaintiff stated in the Function Report that she sometimes goes
25 grocery shopping with her mother and that she shops once a month "if
26 [she] decide[s] to go out with [her] mother"], AR 52 [Plaintiff
27 testified at the hearing that she goes grocery shopping with her mother
28 and not by herself], and AR 282 [Plaintiff stated in the Function Report

1 that although she has the abilities to pay bills, count change, handle
2 a savings account, and use a checkbook or money orders, her mother pays
3 her bills], and AR 283 [Plaintiff stated in the Function Report that her
4 friend takes her out to lunch or dinner or to go walking twice a
5 month]]. Therefore, the degree to which Plaintiff could perform such
6 daily activities may not have been inconsistent with her testimony
7 regarding her symptoms and limitations. See Reddick, supra; see also
8 Morgan v. Commissioner of Social Sec. Admin., 169 F.3d 595, 600 (9th
9 Cir. 1999)("If a claimant is able to spend a substantial part of his day
10 engaged in pursuits involving the performance of physical functions that
11 are transferable to a work setting, a specific finding as to this fact
12 may be sufficient to discredit a claimant's allegations.").

13
14 Third, although an ALJ may discount a claimant's credibility based
15 on an "unexplained or inadequately explained failure to seek treatment
16 or to follow a prescribed course of treatment," Tommasetti v. Astrue,
17 533 F.3d 1035, 1039 (9th Cir. 2008); Bunnell v. Sullivan, 947 F.2d 341,
18 346 (9th Cir. 1991), the ALJ's partial discounting of Plaintiff's
19 testimony about her symptoms and limitations based on her non-compliance
20 with treatment (failing to show up for appointments and not taking
21 medication as prescribed) was not a clear and convincing reason. The
22 evidence on which the ALJ relies (see AR 20-22, 24) -- specifically,
23 Plaintiff's failure to show up for three appointments with her treating
24 psychiatrist (see AR 385 [Medication Visit Interdisciplinary Note dated
25 November 10, 2014], AR 457 [Medication Visit Interdisciplinary Note
26 dated November 30, 2015], AR 453 [Medication Visit Interdisciplinary
27 Note dated April 21, 2016]); Plaintiff's failure to show up for
28 mammogram appointments (see AR 424 [Ambulatory Progress Note dated May

1 6, 2014, stating that "[Patient] needs a mammo order [Patient] missed
2 last appt for mammo"], AR 507 [Ambulatory Progress Note dated May 28,
3 2015, stating that "[Patient] needs a mammo order has no showed a few
4 appt scheduled already"], AR 409 [Ambulatory Progress Note dated
5 December 10, 2014, stating that "[Patient] continues to no show her
6 mammo appts"]; AR 404 [Ambulatory Progress Note dated March 18, 2015,
7 stating that "[Patient] has missed multiple appointment for
8 mammograms"]); Plaintiff's failure to take medications (see AR 508
9 [Ambulatory Progress Note dated May 28, 2015, stating: "[Patient] states
10 that she recently realized that her mom was cutting some of her psych
11 meds in half and was not giving all of them to her as well. [Patient]
12 states she is not taking the medications as prescribed but at the time
13 was feeling tired, dizzy and lethargic."], AR 481 [Ambulatory Progress
14 Note dated May 31, 2016, stating: "[Patient] states her cramping did not
15 improve after stopping her statin. [Patient] however did not restart the
16 statin."]; and Plaintiff's failure to obtain laboratory tests (see AR
17 474 [Ambulatory Progress Note dated September 16, 2016, stating that
18 "[Patient] here for follow up however she did not get her labs drawn as
19 previously requested"] -- does not show that Plaintiff was not compliant
20 with her psychiatric treatment from January 31, 2014, the disability
21 onset date, through April 28, 2017, the date of the ALJ's Decision.
22 Indeed, Plaintiff's mammogram appointments and cholesterol medication
23 are unrelated to Plaintiff's psychiatric treatment. Moreover, at the
24 hearing, the ALJ did not ask Plaintiff about the circumstances of her
25 three missed psychiatric appointments and why she was not taking the
26 psychiatric medications as prescribed. See SSR 16-3p, 2017 WL 5180304,
27 *9 (" . . . [I]f the frequency or extent of the treatment sought by an
28 individual is not comparable with the degree of the individual's

1 subjective complaints, or if the individual fails to follow prescribed
2 treatment that might improve symptoms, we may find the alleged intensity
3 and persistence of an individual's symptoms are inconsistent with the
4 overall evidence of record. We will not find an individual's symptoms
5 inconsistent with the evidence in the record on this basis without
6 considering possible reasons he or she may not comply with treatment or
7 seek treatment consistent with the degree of his or her complaints. We
8 may need to contact the individual regarding the lack of treatment or,
9 at an **administrative** proceeding, ask why he or she has not complied with
10 or sought treatment in a manner consistent with his or her
11 complaints."). Plaintiff may have provided a reason for missing the
12 three psychiatric appointments, like she did on December 8, 2015 (see
13 AR 492 [Ambulatory Progress Note dated December 8, 2015, stating that
14 "[Patient] states she has a psych appointment coming up but she missed
15 her last one because she had to take her mom to the doctor."] and on
16 September 16, 2016 (see AR 474 [Ambulatory Progress Note dated September
17 16, 2016, stating that "[Patient] still seeing her thearpist and
18 psychiatrist although she missed her last psychiatry appointment due to
19 her care [sic] breaking down."])).
20

21 Fourth, the ALJ's partial discounting of Plaintiff's testimony
22 about her symptoms and limitations based on an alleged inconsistency
23 between a statement in a Disability Report that she could not write more
24 than her own name in English and her ability to complete the Function
25 Report by hand was not a clear and convincing reason, as Defendant
26 concedes (see Joint Stip. at 15 ["The ALJ likely erred in finding an
27 inconsistency when a form indicated Plaintiff could not write more than
28 her name, but she was able to complete a hand written function report

1 It appears the disability report form contained a typographical
2 error and was completed by someone else.")]).
3

4 Fifth, to the extent that the ALJ may have attempted to partially
5 discount Plaintiff's testimony about her symptoms and limitations based
6 on the consultative examiner's diagnosis of Plaintiff as a malinger (see
7 AR 401 [Dr. Donohue diagnosed Plaintiff with malingering]), that reason
8 was not clear and convincing. While the ALJ noted the diagnosis (see
9 AR 24 ["Finally, Dr. Donohue's consultative examination report and her
10 diagnosis of malingering is noted (Exhibit B3F/6)]), the ALJ did not
11 affirmatively find that Plaintiff was a malingerer. Moreover, it does
12 not appear that the ALJ acknowledged, considered, or addressed
13 Plaintiff's testimony at the hearing about why she acted as she did at
14 the consultative examination, specifically, that she was not feeling
15 well and was confused (see AR 49-51, 60-61, 64).
16

17 Sixth, while the ALJ also found there was a lack of objective
18 medical evidence supporting Plaintiff's testimony concerning her
19 symptoms and limitations, this factor cannot, by itself, support an
20 adverse finding about Plaintiff's testimony. See Trevizo v. Berryhill,
21 862 F.3d 987, 1001 (9th Cir. 2017)(once a claimant demonstrates medical
22 evidence of an underlying impairment, "an ALJ 'may not disregard [a
23 claimant's testimony] solely because it is not substantiated
24 affirmatively by objective medical evidence.'"; quoting Robbins v. Soc.
25 Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006)); Rollins v. Massanari,
26 261 F.3d 853, 857 (9th Cir. 2001); Tidwell v. Apfel, 161 F.3d 599, 602
27 (9th Cir. 1998); Blaine v. Berryhill, 2018 WL 6243089, *4 (D. Mont. Nov.
28 29, 2018)("The ALJ's conclusion that [the claimant's] testimony would

1 only be accepted to the extent that her hearing testimony was
2 'consistent with the objective medical ... evidence' is that same as
3 rejecting subjective symptom testimony to the extent that it is
4 inconsistent with the objective medical evidence. Here, the ALJ treated
5 consistency with the objective medical evidence as a necessary condition
6 to credibility, *i.e.*, if a certain symptom is *consistent* with the 'other
7 evidence' but *inconsistent* with the 'objective medical evidence' it is,
8 according to the ALJ, not credible. By treating consistency with the
9 objective medical evidence in this way, the ALJ essentially determined
10 that it can be the sole ground for determining that [the claimant's]
11 symptom testimony is not credible, which is the precise practice the
12 Ninth Circuit prohibits."); see also SSR 16-3p, 2017 WL 5180304, *7 ("We
13 must consider whether an individual's statements about the intensity,
14 persistence, and limiting effects of his or her symptoms are consistent
15 with the medical signs and laboratory findings of record.... However,
16 we will not disregard an individual's statements about the intensity,
17 persistence, and limiting effects of symptoms solely because the
18 objective medical evidence does not substantiate the degree of
19 impairment related-symptoms alleged by the individual.").

20
21 Because the Court finds that the the ALJ did not discount
22 Plaintiff's symptom testimony on legally permissible grounds, the Court
23 is unable to defer to the ALJ's credibility determination. Cf. Flaten
24 v. Sec'y of Health & Human Servs., 44 F.3d 1453, 1464 (9th Cir.
25 1995)(the court will defer to the ALJ's credibility determinations when
26 they are appropriately supported in the record by specific findings
27 justifying that decision)(citations omitted).
28

1 **B. Remand Is Warranted**

2
3 The decision whether to remand for further proceedings or order an
4 immediate award of benefits is within the district court's discretion.
5 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
6 useful purpose would be served by further administrative proceedings,
7 or where the record has been fully developed, it is appropriate to
8 exercise this discretion to direct an immediate award of benefits. Id.
9 at 1179 ("[T]he decision of whether to remand for further proceedings
10 turns upon the likely utility of such proceedings."). However, where,
11 as here, the circumstances of the case suggest that further
12 administrative review could remedy the Commissioner's errors, remand is
13 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011);
14 Harman v. Apfel, 211 F.3d at 1179-81.
15

16 Since the ALJ failed to properly assess Plaintiff's symptom
17 testimony, remand is appropriate. Because outstanding issues must be
18 resolved before a determination of disability can be made, and "when the
19 record as a whole creates serious doubt as to whether the [Plaintiff]
20 is, in fact, disabled within the meaning of the Social Security Act,"
21 further administrative proceedings would serve a useful purpose and
22 remedy defects. Burrell v. Colvin, 775 F.3d 1133, 1141 (9th Cir.
23 2014)(citations omitted).⁸
24

25 ⁸ The Court has not reached any other issue raised by Plaintiff
26 except to determine that reversal with a directive for the immediate
27 payment of benefits would not be appropriate at this time. "[E]valuation of the record as a whole creates serious doubt that
28 Plaintiff is in fact disabled." See Garrison v. Colvin, 759 F.3d 995,
1021 (2014). Accordingly, the Court declines to rule on Plaintiff's
claims regarding the ALJ's failure to properly reject the opinions of
Plaintiff's treating psychiatrist and other treating physicians (see
(continued...))

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ORDER

For the foregoing reasons, the decision of the Commissioner is reversed, and the matter is remanded for further proceedings pursuant to Sentence 4 of 42 U.S.C. § 405(g).

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: March 26, 2019

/s/
ALKA SAGAR
UNITED STATES MAGISTRATE JUDGE

⁸ (...continued)
Joint Stip. at 18-24, 29-30), and the ALJ's failure to properly reject the Third Party Function Report completed by Plaintiff's mother. (see Joint Stip. at 30-33). Because this matter is being remanded for further consideration, these issues should also be considered on remand.